North Dakota Attorney General's LAW REPORT

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SEARCH AND SEIZURE - DRUG DOG

In *Illinois v. Caballes*, ____ U.S. ____ (2005), the court upheld the use of a drug detection dog to provide probable cause to search a vehicle after a traffic stop.

The defendant's vehicle was stopped for speeding. Once the stop was reported, a member of a state drug interdiction team overheard the transmission and immediately headed for the scene with his narcotics detection dog. When the officer and the dog arrived, the defendant's car was on the shoulder of the road and the defendant was in the other officer's vehicle. During the process of writing a warning ticket, the officer walked his dog around the defendant's car and the dog alerted at the trunk. Based on that alert, the officer searched the trunk, finding marijuana. The entire incident lasted less than 10 minutes. The Illinois Supreme Court reversed the defendant's conviction, concluding that because the canine sniff was performed without any specific and articulable facts suggesting drug activity, the use of the dog unjustifiably enlarged the scope of the routine traffic stop into a drug investigation.

Reversing the Illinois Supreme Court, the court presented the issue whether the Fourth Amendment required reasonable and articulable suspicion to justify using a drug detection dog to sniff a vehicle during a legitimate traffic stop.

The initial seizure of the defendant, when he was stopped on the highway, was based on probable cause and was lawful. However, a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. A dog sniff occurring during an unreasonably prolonged traffic stop may be the product of an unconstitutional seizure. The court assumed that evidence in this case would also be found to be the product of an unconstitutional seizure if the dog sniff had been conducted while the defendant was being unlawfully detained.

The state court determined the duration of the stop in the case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop. However, the lower court characterized the dog sniff as the cause, rather than the consequence, of a constitutional violation, in that the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation. Because the shift in purpose was not supported by any reasonable suspicion that the defendant possessed narcotics, it was unlawful.

Rejecting the conclusion drawn by the Illinois Supreme Court, the court concluded that conducting a dog sniff does not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringes on the defendant's constitutionally protected interest in privacy.

Official conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment. Any interest in possessing contraband cannot be deemed legitimate. Governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest. The expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable.

A canine sniff by a well-trained narcotics detection dog discloses only the presence or absence of narcotics, a contraband item. Drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband.

The use of a well-trained narcotics detection dog, one that does not expose noncontraband items

that otherwise would remain hidden from public view, during a lawful traffic stop generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of the defendant's car while he was lawfully seized for a traffic violation. Any intrusion on the defendant's privacy expectations did not rise to the level of a constitutionally cognizable infringement.

The court also stated this conclusion was entirely consistent with its decision in Kyllo v. United States, 533 U.S. 27 (2001) that use of a thermal imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to that decision was the fact that the device was capable of detecting lawful activity within the home. Legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from the defendant's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has a right to possess does not violate the Fourth Amendment.

DOUBLE JEOPARDY - RECONSIDERATION OF ACQUITTAL

In *Smith v. Massachusetts*, ____ U.S. ____ (2005), the court reversed the defendant's conviction of a firearm offense.

Smith was charged with three crimes: armed assault with intent to murder, assault and battery by means of a dangerous weapon, and unlawful possession of a firearm. The third crime required, as an element, that the weapon have a barrel of less than 16 inches in length. At trial, the victim testified that Smith had shot him with a pistol, specifically a revolver. No other evidence was introduced regarding the firearm. At the conclusion of the prosecution's case, the trial judge granted a motion for judgment of acquittal of the third count, concluding there was no evidence the gun barrel was less than 16 inches. The defense presented its case, and after the defense rested, the prosecutor brought to the court's attention a state precedent under which the victim's testimony about the kind of gun sufficed to establish the barrel was less than 16 inches. He requested the court defer ruling on the sufficiency until after the jury verdict. The judge agreed, announcing she was reversing her previous ruling and allowing the firearm possession count to go to the jury. The defendant was convicted of all three counts, including the firearm charge.

On appeal, the defendant claimed he was subjected to double jeopardy based upon the trial court's reconsideration of the judgment of acquittal.

The court noted that although the common law protection against double jeopardy historically applied only to charges on which the jury had rendered a verdict, it had long held the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict.

The court's cases made a single exception to the principle that acquittal by a judge precludes reexamination of guilt no less than acquittal by a jury. This exception is when a jury returns a verdict of guilty and a trial judge or an appellate court sets aside that verdict and enters a judgment of acquittal. The Double Jeopardy Clause does not preclude a prosecution appeal to reinstate the jury verdict of guilt. However, when the prosecution has not yet obtained a conviction, further proceedings to secure one are impermissible. Subjecting the defendant to post-acquittal fact-finding proceedings going to guilt or innocence violates the Double Jeopardy Clause.

In this case, when the judge first granted the motion for judgment of acquittal there had been no jury verdict. Submission of the firearm count to the jury plainly subjected Smith to further fact-finding proceedings going to guilt or innocence.

The court concluded the judge's initial ruling on Smith's motion was a judgment of acquittal. Massachusetts's court rules authorize a trial judge to enter a finding of not guilty if the evidence is insufficient, as a matter of law, to sustain a conviction. An order entering such a finding meets the definition of acquittal that double jeopardy cases have consistently used. Such an order actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

In this case, Smith had no reason to doubt the finality of the state court's ruling. The prosecutor did not make or reserve a motion for

reconsideration or seek a continuance that would allow him to provide the court with favorable authority. Rather, the court asked the prosecutor if he had any further evidence and the prosecutor answered in the negative, resting his case. State rules of procedure do not permit the trial court to defer ruling on Smith's motion, nor require a defendant to go forward with his case while the prosecution reserves the right to present more evidence.

The Double Jeopardy Clause's guarantee cannot be allowed to become a potential snare for those who reasonably rely upon it. If, after a facially unqualified mid-trial dismissal of one count, the trial court has proceeded to the defendant's introduction of evidence, the acquittal must be treated as final unless the availability of reconsideration has been plainly established by preexisting rule or case authority expressly applicable to mid-trial rulings on the sufficiency of the evidence. The court rejected any contention that the Double Jeopardy Clause itself must leave open a way of correcting legal errors. The well established rule is the Double Jeopardy Clause will attach to a pre-verdict acquittal that is patently wrong in law.

However, double jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal even when rendered by a jury. In addition, prosecutors are not without protection against ill-considered acquittal rulings. States can and do craft procedural rules that allow trial judges the maximum opportunity to consider with care a pending acquittal motion, including the option of deferring consideration until after the verdict. A prosecutor can seek to persuade the court to correct its legal error before it rules or at least before the proceedings move forward. The prosecutor in this case convinced the judge to reconsider her acquittal ruling on the basis of legal authority he had obtained during a 15 minute recess before closing arguments. Had he sought a short continuance at the time of the acquittal motion, the matter could have been resolved satisfactorily before Smith went forward with his case.

SEARCH AND SEIZURE - DETENTION DURING SEARCH

In *Muehler v. Mena*, ____ U.S. ____ (2005), the court held that use of handcuffs and questioning of an occupant of a premises during a search did not violate the Fourth Amendment.

During an investigation of a gang related, drive-by shooting a search warrant was issued to search premises occupied by a gang member. The person was suspected to be armed and dangerous since he had been recently involved in the drive-by shooting. As it was also known that the gang was composed primarily of illegal immigrants an INS officer accompanied the officers executing the search warrant.

Because it was suspected the house was occupied by at least one and perhaps multiple armed gang members, a SWAT team was used to secure the residence and grounds before the search. Mena, who awoke when the SWAT team entered her bedroom, was placed in handcuffs at gunpoint. Three other individuals, also found in the property, were handcuffed. Mena and the other individuals were taken into a converted garage containing several beds and other bedroom furniture. While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs. During the detention in the garage, the INS officer asked the detainees for their immigration documentation. Mena's status as a permanent resident was confirmed by her papers.

Mena initiated a 42 U.S.C. § 1983 lawsuit against the officers claiming she was detained in violation of the Fourth Amendment and the questioning about her immigration status constituted an independent Fourth Amendment violation. During a jury trial, the jury found the officers had violated Mena's Fourth Amendment rights to be free from unreasonable seizures by detaining her both with force greater than reasonable and for a longer period than reasonable. The judgment was affirmed by the court of appeals.

In reversing the judgment, the court reaffirmed Michigan v. Summers, 452 U.S. 692 (1981), in which the court held that officers executing a search warrant for contraband have the authority to detain the occupants of the premises while a proper search is conducted. Such detentions are appropriate because the character of the additional intrusion caused by the detention is slight and because the justifications for detention are substantial. The detention of an occupant is less intrusive than the search itself and the presence of a warrant assures that a neutral

magistrate has determined probable cause exists to search the home.

In Summers, the court set forth three legitimate law enforcement interests providing substantial justification for detaining an occupant: preventing flight in the event that incriminating evidence is found; minimizing the risk of harm to the officers; and facilitating the orderly completion of the search, because detainees may open locked doors or containers to avoid the use of force.

Mena's detention under Summers was plainly permissible. An officer's authority to detain incident to a search is categorical and does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure. Mena's detention for the duration of the search was reasonable under Summers because a warrant existed to search the premises and she was an occupant of that address at the time of the search.

Inherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention. Summers itself stressed the risk of harm to officers and occupants is minimized if the officers routinely exercise unquestioned command of the situation.

In this case the officers' use of force, in the form of handcuffs, to effectuate Mena's detention in the garage as well as the detention of the three other occupants was reasonable because the governmental interest outweighed the marginal intrusion.

The court noted the imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage. The detention was more intrusive than that upheld in Summers. However, this was not an ordinary search. In inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. Though the safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

Mena was detained for two to three hours in handcuffs. The duration of the detention can affect the balance of interest. However, the time of this detention in handcuffs did not outweigh the government's continuing safety interest. This case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. Mena's detention in handcuffs during the search was reasonable.

The court also rejected the claim that officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. This holding appeared to be premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning constituted a discrete Fourth Amendment event. The court found this premise to be faulty. Mere police questioning does not constitute a seizure. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of the individual, ask to examine the individual's identification, and request consent to search his or her luggage. Since the detention was not prolonged by the questioning there was no additional seizure within the meaning of the Fourth Amendment. The officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.

SEARCH AND SEIZURE - EMERGENCY EXCEPTION - CONSENT - PRESENCE OF THIRD PERSON DURING SEARCH

In *State v. Nelson*, 2005 ND 11, 691 N.W.2d 218, the court reversed the denial of a defendant's motion to suppress evidence obtained from her home.

Law enforcement officers were dispatched to pick up the defendant at her home to transport her to a hospital pursuant to a district court emergency treatment order. Defendant lived in a three-level home, plus a basement. While on the first level, the defendant stated she needed to find her inhaler because she was having an asthma attack. She thought the inhaler was in the den on the first level. The defendant and the officers searched for her inhaler. Two other officers searched other areas of the home while the remaining officers and the defendant searched in the den. One of the officers entered an upstairs bedroom and found a foil bindle sitting on a dresser and, immediately after discovering the

bindle, he heard someone say they had found the inhaler. He confiscated the foil bindle and returned to the den where the inhaler was found in the defendant's purse. The search was approximately a minute.

The officer applied for a search warrant of the defendant's home based in part on the foil bindle found in her home. The search warrant was granted and executed and the defendant's father-in-law was present during the search. In addition, a child protection worker was contacted and requested to come to the home to observe the home's condition. Neither the defendant's father-in-law nor the child protection worker participated in the search.

The search resulted in the defendant's arrest for possession of marijuana and drug paraphernalia. The defendant asserted that the trial court committed error in denying her motion to suppress because the search warrant was obtained based on evidence illegally seized during a warrantless search of her home.

A warrantless search is not unreasonable if the government can prove the search or seizure is subject to one of the few well-delineated exceptions. One such exception is the emergency doctrine. The emergency doctrine allows police to enter a dwelling without a warrant to render emergency aid and assistance to a person they reasonably believe to be in distress. The emergency exception is used when the police need to gain entry into a residence without a warrant. In this case, the officers were already legally inside the defendant's home. Even though the officers were legally inside, the emergency exception could still apply.

To apply the emergency exception, the police must have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance for the protection of life or property, the search must not be primarily motivated by intent to arrest and seize evidence, and there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. The officer's reasonable belief an emergency existed is judged by an objective standard. Under the first requirement, the court applies the emergency doctrine when officers have a reasonable belief a situation involves a serious threat to an individual's health. In this case, officers were inside the defendant's home to transport her to a medical center under a district court emergency treatment order. Before they left the home, the defendant started to have an asthma attack and informed the officer she needed her inhaler. The defendant testified she could not breathe, she was wheezing and struggling to breathe, and the search for the inhaler took less than a minute. Conflicting testimony was presented regarding whether the defendant's condition was an actual emergency. Weighing the evidence in determining the credibility of witnesses is a task exclusively for the trier-of-fact. The court will not resolve conflicts in evidence on appeal. Accordingly, the court reversed the trial court's determination that the emergency doctrine did not apply and remanded the matter for a factual determination of whether an objective person would believe an emergency existed.

The defendant also argued the evidence should be suppressed because she did not give the officers consent to search her entire home. The trial court did not specifically decide whether the defendant consented to the search. Whether she gave consent is a question of fact determined by the totality-of-the-circumstances. In this case, the officer did not specifically request the defendant's consent to search the home. The defendant stated she needed her inhaler but did not ask the officers for help finding it. She stated her inhaler was in the first floor den but did not tell other officers to go upstairs to search for the inhaler. A reasonable person would not believe the defendant's conduct showed consent to search her entire home. To prove consent, the state must show affirmative conduct that is consistent with giving consent; merely showing a person took no affirmative action to stop the police from searching is not enough. Consent to search cannot be implied from silence or the failure to object. The court concluded that none of the testimony in the record clearly proved language or conduct amounting to consent. The defendant's conduct cannot reasonably be interpreted to show that she consented to the search of her home.

The court also concluded that Wilson v. Layne, 526 U.S. 603 (1999), held the presence of third parties in a home during the execution of warrant who were not in the aid of the execution of the warrant is a violation of the Fourth Amendment. The violation of the Fourth Amendment was the presence of third parties, not the presence of the police. The court noted, however, that, since Wilson, courts have held exclusion of evidence is not the correct remedy for this type of Fourth Amendment violation. The exclusionary rule might apply to evidence discovered by third parties present during the execution of the warrant but not

to the evidence lawfully found by law enforcement. In this case, the officers asked the defendant's father-in-law to attend the execution of the search warrant, to let them into the house and help insure against future allegations of misconduct. There is no evidence that the defendant's father-in-law actually discovered any of the evidence seized from her home during the execution of the search warrant. His presence did not expand the scope of the warrant and did not necessitate the suppression of evidence found during the search.

In addition, the presence of the child protection worker also did not violate the Fourth Amendment. The worker was invited by the father-in-law, not by law enforcement. Wilson held the presence of third parties invited by the police violated the Fourth Amendment. In this case, as the defendant's father-in-law, not the officers, invited the worker, the worker's presence did not violate the defendant's Fourth Amendment rights.

On remand, the trial court would be required to make a determination of whether the officers were presented with an emergency situation justifying the search of the defendant's home. If an emergency situation did not exist, the district court would then determine whether probable cause existed, absent items found during the warrantless search, to support the issuance of the search warrant.

DUI - TESTIMONY REGARDING PRIOR STANDARD SOLUTION USE - HEARSAY

In *City of Bismarck v. Bosch*, 2005 ND 12, 691 N.W.2d 260, the court affirmed the defendant's DUI conviction finding the trial court did not abuse it discretion in admitting the test results of an intoxilyzer test.

During trial, an officer testified that he was in charge of the standard solution used for the defendant's intoxilyzer test. A directive issued by the state toxicologist advised that a standard test solution may be used on up to 50 intoxilyzer tests. The officer attempted, during trial, to testify to the number of tests conducted with the standard test solution. This testimony was based upon a document kept by the city police department. The defendant objected, on hearsay grounds to the testimony of the officer relating to the police department records, upon asserting the officer merely related to what other officers had entered on the record and he did not have any direct involvement in the tests. The trial court overruled the defendant's objection and the officer testified the standard solution had been used for 25 tests prior to its use in the defendant's intoxilyzer test.

Under state law, the results of chemical analysis to determine blood alcohol content must be received in evidence if the test sample was properly obtained, and the test was fairly administered and shown to have been performed in accordance with methods and devices approved by the state toxicologist. Absent testimony by the state toxicologist, a foundational requirement necessary to show fair administration of a breathalyzer test and admissibility of the test results is a showing that the test was administered in accordance with the approved methods filed with the clerk of the district court. This filing eases the requirements for the admissibility of chemical test results while assuring that the test upon which the results are based is fairly administered. Whether an intoxilyzer test has been properly administered can be determined by proving that the method approved by the state toxicologist has been scrupulously followed. Scrupulous compliance does not mean hyper-technical compliance.

The required documents were filed in this case. At trial the defendant objected to the admission of the intoxilyzer test results on the basis the state failed to provide adequate proof that the standards solution used for the test had not been used more than 50 times. Although the officer testified that department records indicated the standard solution had only been used 25 times, the officer did not have personal knowledge of each test conducted with the standard solution and could not offer credible evidence the standard solution had been used that many times.

Rejecting this claim, the court noted that nothing in state law requires, for fair administration of a breath test, that a test solution only be used for up to 50 tests unless that requirement is made a part of the approved method for conducting tests. There is no such requirement in the state toxicologist-approved method for conducting breathalyzer tests. The approved method requires running a test sequence that includes a standard solution test to insure the standard solution is within the required concentration for accurate testing. The standard solution used for the defendant's test fell within the accepted parameters of the standards solution test. The defendant did not argue the solution was defective

or not within acceptable concentration levels. There was no reference within the approved method to a limit on the number of tests that can be conducted with the standard solution, nor any indication that using a solution in excess of 50 tests affects the scientific accuracy of the test results.

The state toxicologist filed a standard solution analytical report verifying the standard solution used for the defendant's test was quantitatively tested and met the required concentration for accurate testing. There is nothing in either the statute or the state toxicologist-approved method that limits the number of tests per bottle of solution as a prerequisite of "fair administration" of the test. The court could not infer from the advisory statement in the analytical report that using a standard solution for no more than 50 tests is a necessary part of the approved method for proving fair administration of a test. For a process to be a necessary part of the approved method, the state toxicologist must expressly include it in the approved methodology and make it a part of the requirements for fair administration. The state toxicologist has not expressly made the "up to 50 tests" directive a part of the approved method and the court will not infer that it is a requirement for fair administration of a test.

The term "approved method" has become a word of art. This term refers to the document filed by the state toxicologist under N.D.C.C. § 39-20-07(5) and (6) showing the "operational checklist and forms prescribing the methods currently approved by the state toxicologist and using the device during the administration of the test." Although supplemental materials may be filed having the same force and effect of the material it supplements, unless the state toxicologist includes in the approved method filed with the appropriate entity a specific reference to a supplemental filing stating it is a required part of the approved method for fair administration of a test, the court will not infer that a file document is part of the foundational requirement for proving fair administration. As a result, the analytical report and directive therein that a standard solution may be used for up to 50 tests is not a part of the approved method, and proof of that fact is not a prerequisite to showing administration of the test or to admission of the test results. Evidence that more than 50 tests were conducted with the standard solution used for the defendant's tests, if it exists, may constitute evidence discrediting the test results, thereby affecting the weight to be given to those results, but not their admissibility.

The defendant also asserted he was deprived of his confrontation rights when the officer testified to the number of uses of the standard solution that were conducted by other persons and those persons were neither available nor required to testify. Rejecting this claim, the court noted that having determined the number of tests conducted with the standard solution was not a foundational requirement for showing fair administration of the test for purposes of admitting the test results, the Confrontation Clause argument was irrelevant.

LOSS OR DESTRUCTION OF EVIDENCE

In *State v. Thill*, 2005 ND 13, 691 N.W.2d 230, the court affirmed the defendant's conviction of gross sexual imposition.

In June 1999, the defendant was charged with gross sexual imposition. The trial was set for January 2000, but, before the trial began, the defendant fled the jurisdiction of the court and did not return until December 2002. In September 2003, the defendant moved for dismissal of the case based on the police department's destruction in January 2002 of video tapes and physical evidence. The trial court denied the motion, finding no evidence of misconduct or intentional destruction of evidence by the police and that the lost evidence would not be exculpatory even if it were available to the defendant.

A prosecutor's failure to preserve evidence that is material and favorable to a defendant may violate a defendant's constitutional right to due process and a fair trial. When the evidence is neither plainly exculpatory or inculpatory, the defendant must show the police acted in bad faith. Unless a defendant can prove the state acted in bad faith, failure to preserve potentially useful evidence does not constitute a denial of due process of law. "Bad faith" means the state deliberately destroyed evidence with the intent to deprive the defense of information in that the evidence was destroyed by, or at the direction of, a state agent who intended to thwart the defense.

The defendant argued the state acted in bad faith when it destroyed evidence of videotaped interviews. He did not offer any evidence showing the tapes were exculpatory or the state acted in

bad faith. The trial court found the evidence was likely not exculpatory. The trial court heard evidence from the officer who destroyed the tapes and found no bad faith existed. The officer testified he was cleaning up the evidence room and at the time thought he had permission to destroy the tapes. The officer may have failed to follow regular police procedure by destroying evidence without proper permission but that action did not constitute bad faith. The defendant failed to meet the high evidentiary standard to prove the state acted in bad faith when the evidence was destroyed.

MOTOR VEHICLE STOP

In *State v. Jackson*, 2005 ND 14, 691 N.W.2d 250, the court reversed the trial court's order suppressing evidence found after a motor vehicle stop.

The defendant was driving to work at approximately 3 a.m. An officer observed the defendant's vehicle and mistakenly believed the license plates indicated the vehicle was stolen. In verifying the license plate number, the officer realized the stolen vehicle's license plate number was identical or similar to the defendant's vehicle except the stolen vehicle plates were from the state of Maryland, not North Dakota as on the defendant's vehicle. The officer continued to follow the defendant for approximately 12 blocks and stopped the vehicle after observing what he considered erratic driving. He observed the defendant's vehicle move into the turning lane and abruptly to the driving lane. The defendant was found to be driving while under suspension.

The defendant moved to suppress the evidence obtained from the stop. The district court granted the motion, finding the officer improperly continued to follow the defendant after determining the vehicle was not stolen.

In reversing the district court, the court noted that, in granting the motion to suppress, the lower count found it was improper for the officer to continue following the defendant's vehicle once the officer knew there was no valid reason for a stop.

In previous cases, the court has declined to hold it unreasonable, as a matter of law, for an officer to follow a vehicle for distance before making a stop. It would be unwise for the court to attempt to craft a bright line rule limiting the distance an officer may follow a driver suspected of violating the law before initiating a stop. The court's research had not uncovered any jurisdiction limiting the distance an officer may follow a vehicle before making a traffic stop. The officer's act of following the defendant for approximately 12 blocks did not abrogate any legally sufficient basis for the stop.

SEARCH AND SEIZURE - GARBAGE SEARCH - NIGHT TIME SEARCH WARRANT

In *State v. Fields*, 2005 ND 15, 691 N.W.2d 233, the court affirmed the district court's order suppressing evidence obtained as a result of night time search.

During a garbage search, officer discovered five corner baggies with a white residue powder, one of which tested positive for methamphetamine, and drug paraphernalia that included the strong smell of marijuana. Additional testimony presented for issuance of the search warrant included evidence related to a traffic stop one year previously in which law enforcement officers discovered a handgun, cash, and drugs in the defendant's vehicle. This evidence was a result of a search declared illegal in a prior supreme court decision.

The defendant moved to suppress any evidence found in the search of his home, arguing that the illegally obtained evidence from the 2002 traffic stop could not be used to support the warrant. The trial court agreed and granted a motion to suppress.

The State first argued the evidence was improperly suppressed because, even after excising the illegally obtained evidence, the remaining evidence was sufficient to establish probable cause for the search warrant.

Illegally obtained evidence cannot be used to establish probable cause to issue a search warrant. To determine whether probable cause exists, the court will excise the tainted information from the affidavit and consider the remaining legal

evidence presented to the issuing magistrate. After removing the tainted evidence from consideration, evidence from the garbage search and from police surveillance of the defendant's home remain to establish probable cause for the search.

Where drug residue is discovered in the garbage, it is well established that affidavits based almost entirely on the evidence garnered from garbage may be sufficient to support a finding of probable cause. Probable cause to issue a search warrant exists when probable cause is primarily established from drug residue in garbage. The actual drug evidence found while searching the defendant's garbage, rather than merely an indicia of drugs, is enough to support probable cause. The evidence obtained from searching the defendant's garbage and police surveillance, considering the totality-of-the-circumstances, would warrant a person of reasonable caution to believe the contraband or evidence sought probably would be found in a place to be searched. After excising the tainted evidence, the search warrant was supported by probable cause.

However, the court found the search was invalid because there was no separate finding of probable cause for a nighttime search. North Dakota Rule of Criminal Procedure 41 requires the issuing magistrate to find sufficient showing of probable cause to justify the authorization of a nighttime search. The purpose of the nighttime search requirement is to protect citizens from being subjected to the trauma of unwarranted nighttime searches. Court have long recognized that nighttime searches constitute greater intrusions on privacy than do daytime searches.

Prior decisions which may have approved a per se rule justifying the issuance of nighttime warrants in drug cases are overruled. An officer must set forth some facts for believing the evidence will be destroyed other than its mere existence. A nighttime warrant may be properly issued when the property sought probably would be removed or destroyed if the search warrant was not promptly served.

In this case, the magistrate authorized the nighttime warrant because the defendant kept odd hours or had demonstrated a propensity to violence. Keeping odd hours is insufficient to justify a nighttime warrant. Court rules do not require the defendant's presence during execution of a warrant. Thus, the defendant's odd hours were irrelevant because the warrant could have been executed whether or not he was actually present in his home. His odd hours cannot support a finding of probable cause for the nighttime warrant.

The magistrate also noted the defendant's propensity for violence as a justification for the nighttime warrant. The record did not support the conclusion. The only evidence the magistrate could have relied on for support is the gun obtained during the prior illegal search of the defendant's vehicle. The mere belief firearms are present in the home without any other supporting evidence is insufficient to justify a nighttime warrant. The magistrate was not presented with any corroborating evidence showing the defendant had a propensity for violence through a prior violent criminal history or other supporting information. The nighttime warrant could not be justified by the defendant's purported propensity for violence when that was unsupported by the record.

Considering the totality-of-the-circumstances, the officer did not meet the burden necessary to demonstrate the need for a nighttime warrant. There was no evidence to support a finding of probable cause for a nighttime warrant and the search wasn't reasonable because probable cause for the nighttime warrant did not exist.

SOLICITATION - SEX OFFENDER REGISTRATION

In *State v. Igou*, 2005 ND 16, 691 N.W.2d 213, the court affirmed the defendant's convictions of gross sexual imposition, solicitation of a minor, and failure to register as a sex offender but remanded the matter for resentencing.

The defendant, a registered sex offender, began a relationship with a woman who had a 15 year old daughter, who had a 14 year old friend. The two adults and two children camped together and slept in one large tent. While in the tent, the defendant fondled the 14 year old. At 2:30 a.m., the defendant drove the two children back to Bismarck so the 14 year old could deliver newspapers. They stopped at the defendant's apartment where the 14 year old and the defendant engaged in sexual acts. After the 14 year old was dropped off, the defendant asked the 15 year old if she wanted to have sex and she refused. The 15 year old was afraid to tell anyone

regarding this incident because the defendant said he would kill the girls if they told.

The defendant claimed the evidence did not support his conviction of solicitation of a minor. Rejecting this claim, the court determined the defendant had twice asked the 15 year old to have sex with him and there was sufficient evidence for the jury to have reasonably found that the defendant earnestly requested the child to have sex, with the intent of engaging in sexual intercourse with her in violation of N.D.C.C. § 12.1-20-05.

The defendant also claimed the state failed to establish that he willfully failed to register as a sex offender with local Bismarck authorities. The defendant testified he mailed a letter to the Bismarck Police Department about his change of address in Bismarck but the supervisor of records for the police department testified that, although the department would accept a handwritten notification of a sex offender's change of address, there was no record on file that the department had ever received such a letter from the defendant or that the defendant had attempted to notify the department of his change of address.

The court will not substitute its judgment for that of the jury where the evidence is conflicting, if one of the conflicting inferences reasonably tends to prove guilt and fairly warrants a conviction. Viewing the evidence in light most favorable to the verdict, the court concluded the jury could reasonably have found beyond a reasonable doubt that the defendant violated the registration of sex offender statute.

The court did, however, remand the matter for resentencing because one of the counts wrongly designated the crime as a Class C felony rather than the proper Class A misdemeanor.

DISORDERLY CONDUCT

In *State v. Klindtworth*, 2005 ND 18, 691 N.W.2d 284, the court affirmed the defendant's conviction of disorderly conduct. The defendant and the victim were neighbors. While mowing her lawn, the victim saw the defendant pacing back and forth and pointing his finger at her, but she did not hear what he was saying because the mower drowned out his voice. After the victim completed mowing, the defendant asked her what gave her the right to put grass clippings on his lawn and told her to clean them up. The victim claimed the defendant was yelling loudly and using profanity, which the defendant denied. At trial, the defendant testified the victim "freaked out" because the defendant had been convicted of reckless endangerment months earlier for having shot the victim's husband with a pellet gun while he was mowing the grass. The victim felt terrorized because of the history between the parties and because the defendant's yelling made her fear what the defendant might do to her. In finding the defendant guilty, the court found the victim felt threatened because of the history between the parties and that her fear was reasonable. Because the defendant created an offensive and seriously alarming condition, he was convicted of disorderly conduct.

The defendant claimed that even if he did use profanity, his words and actions did not constitute disorderly conduct. Although there was a dispute whether the defendant used profanity, the court would not weigh conflicting evidence nor would it judge the credibility of witnesses. On appeal, the court will look to the evidence most favorable to the verdict and the reasonable inferences to determine if there is substantial evidence to warrant a conviction.

A victim's alarm or fear is an element of disorderly conduct only if the defendant is charged with those parts of the statute that refer to it. N.D.C.C. § 12.1-31-01(1)(g) is the basis for the defendant's conviction for creating an offensive and seriously alarming condition by an act that served no legitimate purpose.

An objective standard is used to determine whether the person's conduct alarms another individual. Determining the reasonableness of a person's fear in a disorderly conduct case is analogous to the standard used in domestic violence cases. Past actions are relevant in assisting the court's determination of whether a person's fear is reasonable. The district court properly considered the defendant's conduct toward the victim's husband in determining whether it was reasonable that the victim became seriously alarmed when the defendant yelled profanities at her and ordered her to clean his yard. Sufficient evidence existed to sustain the

disorderly conduct conviction by showing a reasonable person would have become alarmed by the defendant's actions in light of his past reckless endangerment conviction.

POST-CONVICTION RELIEF - RESPONSE TIME

In *Johnson v. State*, 2005 ND 19, 691 N.W.2d 288, the court reversed the district court's order denying Johnson's application for post-conviction relief.

Johnson filed an application for post-conviction relief after he pled guilty to a misdemeanor offense. The state made a motion for summary disposition of Johnson's request for post-conviction relief. Although the state's motion provided that Johnson would have ten days to respond, the trial court granted the state's motion for summary disposition seven days later, without having received any response from Johnson. The state conceded that North Dakota Rule of Court 3.2(a) allowed Johnson ten days to respond and it was error for the trial court to rule on the motion for summary disposition prior to expiration of the ten-day response period.

SEARCH AND SEIZURE - MOTOR VEHICLE STOP

In *State v. Smith*, 2005 ND 21, 691 N.W.2d 203, the court reversed the defendant's two drug-related convictions, concluding the evidence obtained to support the conviction was a result of an illegal stop.

A city police officer was approached by two local citizens regarding a suspicious vehicle parked behind a bulk fuel truck in a Cenex lot at about 12:30 a.m. The citizens told him a green station wagon left the Cenex lot quickly, spinning out on the gravel as they approached the vehicle.

The officer followed the vehicle to obtain the license plate number but wasn't able to get the full number because the station wagon was traveling at a high rate of speed. After receiving a radio call from the first officer, a second officer spotted the green station wagon and the first officer told him to stop the vehicle. The second officer, who made the stop, did not observe any traffic violations at the time he pulled the vehicle over.

After he approached the vehicle, the officer saw an open case of beer in the backseat and detected a strong odor of alcohol coming from the vehicle. When asked about the suspicious activity in the Cenex parking lot, the defendant explained that he and his friend had to go to the bathroom, but as the store was locked they went outside near the bulk fuel tank. The officer asked the defendant for consent to search his vehicle and consent was given.

The passenger was determined to be 20 years of age and, during a search of the vehicle, opened beer cans as well as eight rolled bags of marijuana were found. The defendant's request to suppress the evidence was denied and he was convicted at a jury trial of drug possession and paraphernalia offenses as well as delivery of alcoholic beverages to a person under twenty-one years of age, but was acquitted of the offense of possession of a controlled substance with intent to deliver.

A traffic stop temporarily restrains a person's freedom, resulting in a seizure within the meaning of the Fourth Amendment. A traffic stop is analogous to a Terry stop and must be analyzed under its test. To minimize governmental confrontation with individuals as required by the Fourth Amendment, an investigating officer must have a reasonable suspicion that a law has been or is being violated.

The investigating officer, however, does not need personal knowledge that a law has been or is being violated. A directing officer's knowledge may be imputed to an acting officer when the directing officer relays a directive or request to the acting officer without relaying the underlying facts and circumstances. An arresting officer may make an arrest upon a directive even when he is unaware of the factual basis for probable cause because the arresting officer is entitled to assume that whoever issued the directive had probable cause. The same principle would apply in a reasonable suspicion context.

The court has previously upheld investigatory stops of vehicles when the stopping officer received a tip from another officer or informant and then corroborated the information by personal observations.

The stopping officer, however, testified that he did not observe any violations before he stopped the car, so the court had to look at the context in which the directing officer obtained the information and analyze it to see whether it constituted reasonable and articulable suspicion.

Reasonable suspicion requires more than a mere hunch; it requires some objective manifestation to suspect that the defendant was, or was about to be, engaged in unlawful activity.

The information obtained by a police officer from an anonymous informant cannot alone establish probable cause if the tip provides virtually nothing from which a person might conclude the informant is honest or his information is reliable or if the information gives absolutely no indication of the basis for identifying the criminal activities. Information obtained from an anonymous informant used for an investigative stop must be sufficiently reliable to support a reasonable suspicion of unlawful conduct even though it may not meet the more exacting standard of probable cause necessary to make an arrest.

There was no testimony presented that the first officer knew the two citizens or their veracity. Although the officer did view the tire tracks at the Cenex station and knew the station had been broken into several times in recent years, he did not conclude his investigation until the next day when he talked to the manager and employees of the station.

There was no testimony to indicate any kind of emergency, there were no reports of criminal activity in the area, and there was no indication of safety concerns of the occupants. The defendant and his passenger were just sitting in the car around midnight when the two citizens approached. There was testimony the defendant pulled out of the parking lot quickly, spinning gravel, but this is not the same as erratic, fast, extreme driving to avoid a police officer. The flight from the lot after being approached in the dark by two persons unknown to them is more reasonable and less suspicious than someone fleeing from a marked police vehicle. The defendant could have been concerned more for their safety, which would make a quick departure from the parking lot less suspicious. Sitting in the parking lot by itself is not a reasonable and articulable suspicion to order another police officer to stop the vehicle.

With the addition of at least another factor, courts have upheld circumstances that involve a stop of a seemingly innocent car. However, the additional facts - the flight from the parking lot and the possibility of a burglary - are not factual circumstances rising to the level of reasonable and articulable suspicion.

The court also rejected the state's claim that the police officer was justified in ordering a freeze of the situation. The court has previously held that police may freeze a situation in cases involving a limited investigative stop near the scene of a recent crime when corroborating a tip by observing the illegality may not be practicable. However, in this case, the defendant was several miles away from reported activity when the first officer ordered the second officer to stop the vehicle. A police officer may not freeze an unlimitable area to conduct the search.

The court also rejected the claim that the defendant consented to the search, purging any unlawful stop. In determining consent was voluntary, a court examines the totality-of-the-circumstances. A voluntary consent to a search preceded by an illegal police action does not automatically purge the taint of the illegal detention. If the consent is not purged of the unlawful detention, it is still the fruit of the poisonous tree. Since the trial court did not determine whether the stop was unlawful, it did not address the issue of whether the defendant's consent to search his car was voluntary under the totality-of-the-circumstances, which include an unlawful stop, and whether the consent was purged of the taint from the unlawful stop. These are factors which the district court must determine in order to apply the correct legal standard regarding consent following an unlawful detention.

The court also rejected assertions that the search and seizure was the result of a search incident to an arrest, the automobile exception, and inevitable discovery. Since the officer was not justified in stopping the defendant, the search incident to arrest exception failed. In addition, the automobile exception failed because there was no reasonable and articulable suspicion to stop the vehicle. The inevitable discovery doctrine also would not apply because the police officer would not have found the evidence without the unlawful activity. Unlawful activity in this case was the stop, not questioning the passenger. Because the stop was unlawful, the subsequent remedial measures offered by the state would not cure the defect of the stop.

DUI - INSTALLATION AND REPAIR CHECKOUT FORM - APPROVED METHOD

In *Kiecker v. North Dakota Department of Transportation*, 2005 ND 23, 691 N.W.2d 266, the court held that proof of recalibration of the intoxilyzer after it has been moved is not a required foundation for the admission of test results from the device.

On appeal from the administrative hearing officer's decision to uphold the suspension of driving privileges, the district court received a document from an unrelated criminal case and used the document titled "Installation and Repair Checkout" from its analysis to conclude that proof must be established that the machine was recalibrated in accordance with the installation and repair checkout form prepared by the state toxicologist office. This must be done to introduce the results of the intoxilyzer test when the machine has been moved.

In reversing the district court's decision, the court recognized the method for accepting the results of a chemical test into evidence is set forth in statute. One of the purposes of the statutory regulation regarding documents to be filed to establish the approved methods of the state toxicologist is to ease the burden on the prosecution in laying an evidentiary foundation for a blood alcohol report. The statute balances procedural efficiency and scientific reliability by allowing scrupulously completed documents as evidence in lieu of lengthy testimony. Properly completed and certified documents can fulfill the foundational requirements to admit a blood alcohol report. Testimony disputing the facts contained in properly completed documents will generally affect the weight given to the test and not its admissibility. If the documentary evidence in the testimony of the participants administering the tests does not show scrupulous compliance with the methods approved by the state toxicologist, the statutory mode of authentication cannot be used.

The court rejected Kiecker's assertion the hearing officer committed error because the department failed to show the intoxilyzer machine was recalibrated after it was moved. For a process to be a necessary part of the approved method, the toxicologist must expressly include it in the approved methodology and make it a part of the requirement for "fair administration." The department was not required to furnish the hearing officer with a recalibration certificate to prove the intoxilyzer test was fairly administered because recalibrating an intoxilyzer machine after it has been moved is not expressly included in the prescribed methods provided by the state toxicologist. The court will not infer that a filed document is part of the foundational requirement for approving fair administration if the document was not specifically referenced in the approved method as being required for fair administration of a test.

The department introduced certified copies required by statute. The state toxicologist had not made the recalibration of intoxilyzer machines part of the prescribed method and it is not required under the statute. The department is not required to show the instrument had been recalibrated to lay a proper foundation for the admission of the intoxilyzer test.

NORTH DAKOTA RULE OF CRIMINAL PROCEDURE 16 - DISCLOSURE OF REBUTTAL EVIDENCE

In *City of Grand Forks v. Scialdone*, 2005 ND 24, 691 N.W.2d 198, the court upheld the defendant's DUI conviction.

As in Kiecker v. North Dakota Department of Transportation, 2005 ND 23, 691 N.W.2d 266, the court also held that evidence regarding completing checks on the calibration of an intoxilyzer machine when moved was not a foundational requirement for showing that an intoxilyzer test was administered in accordance with the approved method for conducting the test, or the admission of a test result into evidence.

A trial, the defendant raised the issue regarding failure of the city to establish the recalibration during its case. In rebuttal, documents were introduced establishing that checks had been performed on the machine that conducted the defendant's test after it had been moved. The defendant claimed that she did not have time to prepare for the evidence or for cross examination of the field inspector because the evidence was

only produced during the trial, and that the city should have been aware of foundational problems before trial. The defendant claimed that any testimony the city planned to offer regarding the calibration of the intoxilyzer machine should have been previously disclosed.

Rejecting this claim, the court recognized that even if the machine had been checked after being moved this was not a foundational requirement for admission of the evidence of the test result. The challenged documents and testimony were offered as rebuttal evidence. The government is not obligated by Rule 16 to anticipate every possible defense. If the defendant felt surprised, her remedy was to request a continuance. No continuance was requested. In addition, the defendant failed to show that North Dakota Rule of Criminal Procedure 16 required advanced disclosure of rebuttal evidence. Federal courts construing the corresponding federal rule have held that the rule does not apply to rebuttal evidence.

RESTITUTION - ABILITY TO PAY - REPLACEMENT COST

In *State v. Tupa*, 2005 ND 25, 691 N.W.2d 579, the court held that the trial court has wide discretion in setting the amount of restitution if it is in the range of reasonableness.

Two defendants appealed from restitution orders directing them to pay $12,000 in victim compensation stemming from pleading guilty to felony criminal mischief. The two defendants, along with two other juveniles, were involved in the crime and criminal judgments were entered against the two defendants ordering them to pay one-quarter of an amount to be determined at a restitution hearing. At the restitution hearing, the property owners testified the damage to his real and personal property, plus a $30 per hour allotment for cleaning costs, totaled over $93,000. Replacement values were used to calculate many of the damages. The defendants presented expert testimony regarding the amount of damage to the real and personal property. The expert testified the real property diminished in value by $15,000 while the victim's family's personal property decreased in value by a little over $9,000 for an overall damage total of $24,000. The two defendant's were each ordered to pay $12,000 in compensation payable at $500 per month during the 24 month probations. Thus, total damages were set at $48,000.

The defendants first asserted the district court abused its discretion in setting the amount of restitution by improperly relying on the victim's damage figures which were based on replacement values. Replacement cost is defined as the cost of acquiring an asset that is as equally useful or productive as an asset currently held. The defendants claimed the district court should have relied upon costs to repair or on diminished fair market value to calculate restitution, to avoid giving the victim a windfall.

The trial judge listened to, and was persuaded by, the defendant's complaints regarding the victim's figures of damage. The trial court restitution award was not the product of a blind reliance on the victim's data. In setting restitution, the trial court did not exclusively rely on testimony offered by the victim or the defense experts. The trial court arrived at its own measure of damages which was between the values offered by the victim and the defense witnesses. Implicit in such a calculation is the utilization of multiple measures of damages designed to make a particular victim whole in varying and unique aspects of his loss.

The Legislature has authorized restitution in an amount that would be commensurate with reasonable damages, which is limited to those expenses actually incurred as a direct result of the defendant's criminal action. Reasonableness in this context cannot be reduced to any one formulation. Trial courts are vested with a wide degree of discretion in arriving at restitution awards. While diminution in value remains one of the measures of damage, there are situations where replacement costs will be needed to make a criminal victim whole or to reimburse the victim for reasonable expenses actually incurred. As an example, if a person has owned a set of dishes for the previous decade, the fair market value of this item would be very small. However, a victim who has these dishes destroyed will have little choice but to procure replacement dishes which are presumably not readily or desirably, found in a secondary market. In other situations, replacement costs will be excessive and diminutions in fair market value or repair costs will be in order. If an item can be cost-effectively repaired or restored, this approach should be favored over awarding replacement value. If an item already has an acceptable secondary market, such as for automobiles or certain pieces of equipment or machinery, diminution in fair

market value may be an adequate measure of the victim's reasonable expenses actually incurred. The factual situation at hand must be examined to determine whether the trial judge acted according to reason. The court will not require the trial court to itemize each intricate, individual calculation. The trial judge's restitution award in this case was within the range of reasonableness and was supported by a preponderance of the evidence.

The trial court is not limited to civil law measurements regarding damage to property and tort action when determining the proper restitution amount in a criminal proceeding.

The court also rejected the defendant's claims the trial court abused its discretion in determining each defendant's ability to pay restitution. The defendant has the burden to raise and prove an inability to pay restitution at both the initial restitution hearing and any subsequent revocation proceedings triggered by the defendant's failure to pay ordered restitution. The defendant argued the trial court abused its discretion by setting restitution payments at a level that will effectively force the defendants to delay their academic pursuits, which threatens the victim's family's reimbursement. Although a college education is desirable, it does not take precedence over answering for one's criminal misdeeds. The defendants' future choices are limited by their past actions. A restitution payment can be based on what one can or will be able to pay, which implies a consideration of future factors. Although the defendants may not currently possess the means to pay $500 per month, they can seek gainful employment and begin repayment.

ILLEGAL POSSESSION OF FIREARM

In *State v. Buchholz*, 2005 ND 30, 692 N.W.2d 105, the court held that N.D.C.C. § 62.1-02-01(2) prohibits a person who had pled guilty to a felony, but subsequently reduced to a misdemeanor at sentencing, from possessing a firearm.

The defendant pled guilty to a class C felony. He received a 60-day suspended sentence and one year of probation. A year later, during the execution of a search warrant, officers found a rifle under the bed in the residence where the defendant was staying. He admitted ownership and was then charged with being a felon in possession of a firearm in violation of N.D.C.C. § 62.1-02-01(2). At a preliminary hearing, the district court discharged the defendant, finding he was not a "convicted felon" since, at sentencing for the original offense, he was deemed to have been convicted of a misdemeanor upon his plea to the felony and his sentence of not more than one year.

On appeal, the court rejected the trial court's conclusion. N.D.C.C. § 62.1-02-01(2) prohibits a person who has been convicted of a certain class of felonies from possessing a firearm for a period of five years after the date of conviction. The statute also defines the term "conviction" as meaning a determination by a court or jury that a person committed the offense even though the defendant's conviction has been reduced in accordance with N.D.C.C. §12.1-32-02(9). That latter section deems a person, who is convicted of felony, to be convicted of a misdemeanor upon receipt of a term of imprisonment of not more than one year.

The court concluded the statutory language is clear and unambiguous. A person convicted of a felony and sentenced to not more than one year, despite the immediate reduction to a misdemeanor conviction, is still initially convicted of a felony. The 2001 amendments to N.D.C.C. § 12.1-32-02(9) merely changed the point in time when a felony conviction is reduced to a misdemeanor conviction but the fact remains the defendant was originally convicted of a felony and that the felony is thereafter reduced. After the 2001 amendments, the reduction from a felony conviction to a misdemeanor conviction occurs immediately upon the entry of sentence. Before the 2001 amendments, the reduction occurred after the completion of a sentence and probation. N.D.C.C. § 62.1-02-01 specifically states that a person is convicted of a felony even if the defendant's conviction has been reduced in accordance with subsection 9 of section 12.1-32-02. The court would not interpret statutes under a construction that would render part of the statute mere surplusage.

GROSS SEXUAL IMPOSITION - CHILD TESTIMONY - HEARSAY - 404(b) EVIDENCE

In *State v. Ramsey*, 2005 ND 42, 692 N.W.2d 498, the court affirmed the defendant's conviction of gross sexual imposition for engaging in sexual contact with a female under the age of 15 years.

The defendant's 10-year-old niece spent a week with the defendant, her father, and her sister at the Ramsey family farm in North Dakota. The defendant lived in Florida and the victim and her sister visited the defendant's home. While in Florida, the defendant's wife discovered the defendant in a locked bathroom with the 10-year-old. The defendant was touching the child's vaginal area while applying a yeast infection medication that she frequently applied to herself without assistance. The next day, the girl told the defendant's wife that the defendant had touched her on more than one occasion during the week she spent in North Dakota. The North Dakota and Florida incidents were reported to law enforcement officials and investigated. At trial, the victim testified and the trial court allowed the victim's mother, the victim's aunt, a Florida deputy sheriff, and a Florida sex crimes investigator to testify as to what the girl had told them about the defendant's actions. The defendant claimed the trial court committed error in allowing hearsay testimony through the other witnesses of the victim's hearsay statements.

The defendant objected to the admission of the statements at a pretrial hearing but did not renew his hearsay objections during the trial except for the testimony of his wife. Even if a defendant objects at the pretrial hearing on a motion concerning the propriety of North Dakota Rule of Evidence 803(24) evidence, failure to object at trial to the testimony of the child victim's out-of-court statement regarding sexual abuse limits the appellate court's inquiry to determining whether its admission into evidence constitutes obvious error affecting substantial rights.

The court will not set aside a correct result merely because the district court assigned an incorrect reason if the result is the same under the correct law and reasoning. In this case, the trial court admitted the out-of-court statements through the other witnesses under North Dakota Rule of Evidence 803(24). However, the court found the testimony was admissible under North Dakota Rule of Evidence 801 as prior statements of witnesses offered to rebut an expressed or implied charge of recent fabrication or improper influence or motive. During trial, the defendant argued, directly and impliedly, that the child's version of events was a fabrication resulting from improper influence and motive. Once the defendant argued that improper influence and motive caused the victim to fabricate her allegations, North Dakota Rule of Evidence 801(d)(1)(ii) became applicable. The statements the child made to her aunt, her mother, a Florida deputy sheriff, and a Florida sex offender child abuse investigator were not hearsay and were properly allowed as substantive evidence under that rule.

The defendant also claimed the Florida incident, which occurred after the North Dakota offenses, was unfairly prejudicial and should not have been admissible under North Dakota Rule of Evidence 403 and 404(b). The trial court, in its pretrial evidentiary order, found the alleged Florida contact and events to be evidence of activity in furtherance of the same criminal activity, noting that both occurrences happened within a three-week span and that the victim was under the defendant's care on both occasions.

The court distinguished between the acts performed by the defendant and a "grooming" or preparation for acts in North Dakota. The contact between the defendant and the child that occurred in North Dakota and the similar contact that later occurred in Florida were two wholly separate and independent acts. Admitting the conduct in Florida to show a propensity to commit such acts would constitute error. Dangers are inherent in allowing evidence of other acts to show propensity in attempting a jury to convict a defendant for actions other than the charge of misconduct.

However, the court found that these separate and independent acts were admissible under the exception to North Dakota Rule of Evidence 404(b) to establish proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Although previous opinions considered in the "admissibility of other crimes" evidence under North Dakota Rule of Evidence 404(b) involved "prior acts" (acts occurring before the charged crime), this rule was not read by the court to include only "prior acts." Subsequent acts by the defendant should be considered under the same analysis. Rule 404(b) only excludes evidence of other acts or crimes committed by the defendant when they are independent of the charged crime and do not fit into the rule's exception. The trial

court conducted an alternative analysis under Rule 404(b), finding evidence of the later Florida events admissible under the rule's "plan" or "absence of mistake or accident" exceptions.

The trial court also determined the evidence was admissible under North Dakota Rule of Evidence 403. The rule does not authorize automatic admission merely because the proponent advances a proper purpose for the evidence but the relevance and probative value of the evidence must be demonstrated. In this case, the trial court conducted a Rule 403 balancing test to weigh the probative value of the evidence against the possible prejudicial effect on the defendant's position.

A trial court should exercise its power to exclude evidence under Rule 403 sparingly, recognizing that any prejudice due to the probative force of evidence is not unfair prejudice. Rule 403 applies to unfairly prejudicial evidence and not evidence that is simply prejudicial. No verdict could be obtained without prejudicial evidence. Evidence of the contact between the defendant and the child occurring in Florida was especially probative because the defendant's defense at trial was one of fabrication by the child. The North Dakota contact was revealed as a result of what happened in Florida, and the subsequent reports to the victim's mother and law enforcement in Florida resulted in the child's statements to Florida officials. The probative value of the evidence exceeds any unfair prejudice that might arise out of the admission of the evidence. The trial court's 404(b) and 403 analysis was correct and its decision to admit evidence of the Florida contact was not an obvious error.

POST-CONVICTION RELIEF - TIMELY RESPONSE - WITHDRAWAL OF GUILTY PLEA

In *Gamboa v. State*, 2005 ND 48, ____ N.W.2d ____, the court affirmed the denial of Gamboa's motion for default summary judgment and dismissal of his application for post-conviction relief without a hearing.

In October 1996, Gamboa was convicted of delivery of marijuana. In February 2000, at a revocation hearing, Gamboa admitted to parole violations and was sentenced to 60 days. In 2003, Gamboa applied for post-conviction relief, arguing ineffective assistance of counsel during his 1996 conviction, and requesting withdrawal of his guilty plea. Gamboa relied on the clerk to serve the state. The application was made on March 24, 2003, but it was not served on the state until July 1, 2003, with the state responding on July 15, 2003. Gamboa moved for default summary judgment arguing the state failed to timely respond to his application within 30 days of docketing the application.

In rejecting Gamboa's claim, the court noted the 30 day time limit is discretionary, not mandatory, and the district court has discretion to allow more than 30 days for the state to respond. Absent proof a petition was prejudiced by the delay in proceedings, refusal to grant a default judgment is not an abuse of discretion. The district court reviewed all of the transcripts from prior proceedings involving the defendant's guilty plea, and found no merit to his application. In addition, Gamboa failed to show he suffered any prejudice by the state's failure to timely respond. It was not an abuse of discretion for the district court to deny Gamboa's request for default judgment.

Gamboa also claimed his 1996 guilty plea was involuntary because of ineffective assistance of counsel and counsel's conflict of interest.

An application under the post-conviction procedure act seeking to withdraw a guilty plea is generally treated as one made under North Dakota Rule of Criminal Procedure 32(d), requiring a timely motion for withdrawal of a guilty plea. The court was required, in this case, to address the issue of whether a request to withdraw a guilty plea in a post-conviction relief proceeding is timely. The North Dakota post-conviction statutes do not require timeliness, but it is a factor to be considered when determining whether relief should be granted. Failure to timely bring a motion to withdraw a guilty plea raises questions about the motion's legitimacy and the doubt is intensified when the petitioner does not challenge the guilty plea until the sentence is executed after a probation violation. In this case, Gamboa did not challenge the voluntary nature of his guilty plea even after his sentence was executed following a probation violation in February 2000. He failed to file either a direct appeal or a petition for post conviction relief for more than six years after his guilty plea until he was sentenced by a federal court to a term in excess of life. Gamboa's request to withdraw his guilty plea was untimely under North Dakota Rule of Criminal Procedure 32(d) and the court affirmed

dismissal of his application for post-conviction relief.

POST-CONVICTION RELIEF - TIMELY RESPONSE

In *Kaiser v. State*, 2005 ND 49, ____ N.W.2d ____, the court reversed the trial court's order dismissing an application for post-conviction relief.

On February 6, 2004, Kaiser applied for post-conviction relief asserting his conviction was invalid on numerous grounds. On March 8, 2004, the state moved for dismissal and summary disposition. Without waiting for Kaiser to respond to the state's motion, the district court issued a memorandum opinion and an order dismissing the application for post-conviction relief. The judgment was entered on March 17, 2004.

The explicit purpose of the Uniform Post-conviction Procedure Act is to provide a method to develop a complete record to challenge a criminal conviction. The court may not dismiss an application for post-conviction relief without affording the applicant 30 days after service of the state's brief in which to respond to the state's motion for summary disposition. Post-conviction relief proceedings are civil in nature and are governed by North Dakota Rules of Civil Procedure. Since matters outside the original pleadings were submitted by the state in support of its motion, North Dakota Rule of Civil Procedure 12(b) requires the motion be treated as one for summary judgment and disposed of as provided in North Dakota Rule of Civil Procedure 56. Rule 56 requires the motion for summary judgment and supporting papers be served at least 34 days before the motion maybe heard and the adverse party will have 30 days after service of a brief to file an answer brief and supporting papers. Under Rule 56, Kaiser should have been afforded 30 days after service of the state's brief within which to serve and file an answer brief and supporting papers.